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ABSTRACT

This report discusses public school legal liability in the Acquired Immune Deficiency Syndrome (AIDS) controversy with regard to the right of privacy of AIDS victims who are students and employees and the concern of risk of contagion to other students and employees and the public's right to know what is going on in their schools. Several steps that can protect local districts from tort claims and ideas for respecting the privacy rights of carriers in a manner that accords them optimal legal and medical protections are given. A sex education curriculum with a heavy emphasis on the prevention of AIDS and other sexually transmitted diseases at the lowest grade possible as part of any health and hygiene program is advocated, along with extending handicap discrimination protections to AIDS victims. Pointing out the disease's increasing danger to staff and students alike and the urgency of public school information activities and reform regarding AIDS and AIDS victims, this report identifies its target populations, among whom are 8,000 children. Significant court cases are reviewed and used in support of these positions. (JAM)

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AIDS: IS ANY RISK TOO GREAT?

THE 1987 PERSPECTIVE

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Prepared for: NSBA's Council of School Attorneys'
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AIDS: IS ANY RISK TOO GREAT? - THE 1987 PERSPECTIVE

by Fay Hartog-Rapp*

I. THE MEDICAL STATUS

Since the legal flood waters regarding the rights of AIDS[1] victims were unleashed in mid-1983,[2] the conflict between the medical community's ability to deal with the spread of AIDS and the legal community's development of AIDS legal rights, has created an enormous tension. While the position of the medical experts with respect to the risk of transmission in the general population has remained constant since the Centers for Disease Control (CDC) promulgated their Workplace Guidelines in 1985,[3] the fear of an AIDS plague has reached national proportions.

By the end of 1986, the United States Surgeon General had taken a public position that the threat of AIDS should be sufficient to permit a sex education curriculum with a heavy emphasis on the prevention of AIDS and other sexually transmitted diseases at the lowest grade possible as part of any health and hygiene program.[4] While the Surgeon General reiterated the medical community's position that there was no

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c Fay Hartog-Rapp, 1987

risk from casual contact, he concluded that heterosexual persons were increasingly at risk. Surgeon General C. Everett Koop described the risk of transmission according to the generally accepted standard as follows:

> There is no known risk of non-sexual infection in most of the situations which we encounter in our daily lives. We know that family members living with individuals who have the AIDS virus do not become infected except through sexual contact. There is no evidence of transmission (spread) of AIDS virus by everyday contact even though these family members shared food, towels, cups, razors, even toothbrushes and kissed each other. ...
>
> Everyday living does not present any risk of infection. You cannot get AIDS from casual social contact. Casual social contact should not be confused with casual sexual contact which is a major cause of the spread of the AIDS virus. Casual social contacts such as shaking hands, hugging, social kissing, crying, coughing or sneezing will not transmit the AIDS virus. Nor has AIDS been contracted from swimming in pools or hot tubs or from eating in restaurants (even if a restaurant worker has AIDS or carries the AIDS virus). AIDS is not contracted from sharing bed linens, towels, cups, straws, dishes or any other eating utensils. You cannot get AIDS from toilets, doorknobs, telephones, office machinery, or household furniture. You cannot get AIDS from body massages, masturbation, or non-sexual body contact.[5]

Those identified as the high risk population for contracting AIDS are homosexual and bisexual males who have had sexual contact with other homosexual or bisexual males as well as those who "shoot" street drugs. Sexual partners of these high risk individuals are at risk, as well as any children born to women who carried the virus.[6]

Finally, the recognition that AIDS is a major public health issue is premised on its projected impact on our society. By the end of 1991 an estimated 270,000 cases of AIDS will have occurred with 179,000 deaths within the decade since the disease was first recognized in 1981. In the year 1991, an estimated 145,000 patients with AIDS will need health and supportive services at a total cost of between $8-16 billion dollars.[7]

National commentators increasingly predict a grim medical future regarding the AIDS epidemic. Health and Human Services Secretary Otis R. Bowen announced on January 29, 1987:

> A worldwide AIDS epidemic will become so serious that it will dwarf such earlier medical disasters as the Black Plague, smallpox and typhoid. ... If we can't make progress we face the dreadful prospect of a worldwide death toll in the tens of millions a decade from now.[8]

Newsweek Magazine stated that by 1991 an estimated 5 million Americans may be carrying the AIDS virus. Newsweek's cover story predicted that the epidemic could impact health care, government policy, civil liberties, and attitudes towards sex. In terming it a "race between hope and fear," Newsweek stated:

> Those on the front lines on the war against AIDS are convinced there are two enemies to fight. One is the epidemic itself, the other is fear. Despite that, experts on the disease are nearly unanimous, at least

> publicly, in stressing their belief that the epidemic can be held in check.[9]

But Newsweek believed that those who make it their business to worry about the disease "are very worried indeed." Their concern, in blunt language, is that AIDS is on the verge of "breaking out into the population at large." The source of the contagion, in all probability, is or will be intravenous drug users - a submerged and secretive population totaling about 1.5 million people nationwide.[10] IV drug users, most of whom are heroin addicts, are least likely to get the message about controlling the spread of AIDS. Most are young men with limited education, a history of criminal behavior, and only tenuous ties to the community or their families.[11]

Clearly AIDS cases among children are increasing at the same or greater rate as the national increase of AIDS cases generally. As of January 26, 1987, 423 AIDS cases involving children younger than 13 were reported to the CDC. Of those cases, 252 have died. Based on a doubling rate every 12 to 14 months, the CDC estimates that 4,000 cases of AIDS in children will be diagnosed by 1991 and that an additional 8,000 cases of AIDS-related complex will also be diagnosed. These figures are considered conservative so that the total number of children with AIDS could be significantly higher.[12] Of the 423 cases reported, 80% were attributable to mothers

infected with the AIDS virus. Another 12% was attributable to infection through blood transfusion; 5% attributable to hemophiliac treatment; and 3% of undetermined origin.[13]

The encouraging aspect of the Newsweek report was the survey of attitudes towards AIDS. The survey indicated that more people are educated on the low risk of transmission of AIDS in the school setting, and therefore, would be less likely to fight to have an AIDS child removed from school.[14] And yet, the epidemic of fear has created a whole new body of law[15] in which the rights of the AIDS victim are matched with the rights of school boards or other employers, other school children, and the population at large to take whatever steps deemed necessary to avoid the risk of contact with the AIDS virus. In this context, school boards must balance the medical risks of transmission within the schools with the legal risks of liability for any adverse action against any student or employee identified as an AIDS victim.

II. THE LEGAL RISKS IN DEALING WITH AIDS.

A. Introduction

School boards' risks in dealing with AIDS victims as students and employees extend to many different levels. On the first and most obvious level is the concern of risk of contagion to students and other employees. In most cases the

medical experts conclude that the risk of transmission through casual contact such as would be found in a school setting, is minimal. The uninformed conclusion of the general public is that no medical risk is acceptable where the impact is almost always guaranteed to result in death.[16] But the risks to school boards as employers involves several other legal issues.

B. Balancing the Legal Rights of the AIDS Victims

The evolving tension for public employers such as school boards is that each legal risk in one area carries with it a risk in another area. The risks of depriving an employee or a student of his or her constitutional rights to privacy are balanced against the public's increasing demand to know of those conditions within the schools and the workplace which present health hazards. The apparent legal trend to protect AIDS victims from handicap discrimination is countered with the growing demand that all cases of AIDS be treated as contagious diseases for public health reporting purposes. The evolving right to privacy in blood screening and testing conflicts with by the insurance company's right to exclude pre-existing conditions from health and life insurance coverage. The prohibition against insurance companies from excluding AIDS from coverage under its policies is contrasted with the

limitations on employers to declare asymptomatic AIDS carriers permanently disabled.[17] The risks in each of these categories has been identified by case law, regulation or statute. A similar trend appears to be evolving in the context of protecting student AIDS victims from discriminatory exclusion from schools.

With the United States Surgeon General advocating AIDS education at the earliest grade possible, the schools will be at risk in their curriculum development regarding sex education, either for too much or not enough information. Since the determination of the risks to school boards in dealing with AIDS must be made through application of the traditional balancing of interests test, the risks at each level must be examined.

While the legal community awaited the Supreme Court's pronouncement in School Board of Nassau County v. Arline,[18] states and other local jurisdictions began carving out handicap protections for AIDS victims. Many states have officially concluded that AIDS carriers are protected under handicap statutes. Those states include New York, District of Columbia, Florida, Massachusetts, Oregon, Maine, Pennsylvania, New Jersey and Virginia.[19] Other states have informally concluded that AIDS is a handicap protected under the relevant handicap statutes. Those states include Ohio,

Texas, California and Washington. Many other states have adopted various forms of AIDS protection in their prohibitions against AIDS testing or prohibition from insurance exclusion. Those states would include Arizona, California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, North Dakota, South Dakota, Wisconsin and Washington, D.C.

C. Handicap Protections of Employees

In 1986 there were several key legal developments indicating that AIDS victims would be accorded handicap protections under the applicable federal laws. First, there was a large settlement of a 1985 case which had been filed before the Florida Commission on Human Relations, Shuttleworth v. Broward County.[20] Todd Shuttleworth was discharged as an administrative and management intern when diagnosed with AIDS. The Commission was the first state agency to determine that AIDS was deemed to be a protected handicap under Florida's statutes. In court, Shuttleworth sought $15 million in damages. The 11th hour settlement included two years' back pay, the County's assumption of all outstanding medical bills, reinstatement of health and life insurance and attorneys' fees. In addition, Shuttleworth was rehired in a new job developing a policy to deal with the County's 400 AIDS cases.[21]

In another case brought under Section 504 of the 1973 Vocational Rehabilitation Act, a North Carolina Hospital was

sued for refusing to allow a nurse with AIDS to work. The Department of Health and Human Services' Office for Civil Rights ruled on August 5, 1986, that the hospital had discriminated against the nurse under Section 504. Unfortunately, the ruling came two years after the bias charge had been filed and six months after the complainant had died.[22]

In Board of Education of Nassau County v. Arline, supra at n.18, the issues presented for review to the United States Supreme Court were as follows:

1. Whether the contagious infectious disease of tuberculosis constitutes a handicap within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq.; and

2. Whether one who is afflicted with the contagious infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of an elementary school teacher within the meaning of Section 504, 29 U.S.C. 794.

Gene Arline was a teacher who had been terminated after several recurrences of tuberculosis. At the time she was initially hired she was determined to be free of tuberculosis although she had had a history of tuberculosis infection at that time. The Eleventh Circuit Court of Appeals held that the contagious disease of tuberculosis constituted a handicap

within the meaning of Section 504 of the Rehabilitation Act of 1973 and remanded the case for further findings as to whether the risks of infection precluded the teacher from being otherwise qualified for her job. The School Board appealed to the U.S. Supreme Court.

D. The Supreme Court's Decision In School Board of Nassau County v. Arline

In a 7-2 decision, the United States Supreme Court held that a person suffering from the contagious disease of tuberculosis was a handicapped person within the meaning of Section 504 of the Rehabilitation Act of 1973. School Board of Nassau County v. Arline, supra, at fn. 18. In an opinion with potentially wide-ranging application, Justice Brennan, writing for the majority, broadened the Rehabilitation Act's coverage to victims of certain contagious diseases. Although the Court's decision dealt only with tuberculosis victims, many predict the case is a precursor of cases involving AIDS victims, and advocates concerned about discrimination against victims of AIDS viewed the decision as a victory. However, this may be premature as the Court expressly declined to rule on the question of whether a carrier of AIDS could be considered to have a physical impairment or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Rehabilitation Act.

1. The Majority Opinion

Writing for the Court, Justice Brennan initially observed that by enacting and amending the Rehabilitation Act, Congress had intended to share with handicapped Americans, the opportunities for education, transportation, housing, health care, and jobs that other Americans take for granted. Congress, he wrote, was concerned with protecting the handicapped against discrimination stemming not only from simple prejudice, but from "'archaic attitudes'" and from the "'fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps.'"[23] The Court proceeded with a two-pronged analysis under the Rehabilitation Act; the first prong being whether a person suffering from a contagious disease could be considered handicapped within the meaning of the Act, and second, if so, whether that handicapped person could be "otherwise qualified" to perform the job in question -- here teaching.

The Rehabilitation Act's definition of a "handicapped individual" includes a person who has a physical or mental impairment which substantially limits one or more of such persons major life activities. The Act's regulations define "physical impairment" to include any physiological disorder

or condition, cosmetic disfigurement, or anatomical loss affecting, among other things, a person's respiratory system. The regulations define "major life activities" as "functions such as ... working." Noting that Arline had previously been hospitalized for her tuberculosis, the Court concluded that this was "more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment."[24] Thus, the Court held she was a handicapped individual within the meaning of the Rehabilitation Act.

Justice Brennan rejected the School Board's argument that Arline's record of impairment was irrelevant since she was dismissed because she posed a health threat to others. The Court disagreed with the School Board's assertion that, under the Act, the contagious effects of a disease can be meaningfully distinguished from the diseases' physical effects on a claimant in a case such as this.

> Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.[25]

Allowing discrimination based on the contagious affects of a physical impairment would be inconsistent with the

purpose of the Act, the Court declared. It went on to note that, by amending the definition of a handicapped individual, Congress acknowledged that society's "accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the actual impairment."[26] In this passage, the Court evidenced its willingness to protect individuals against the irrational fears or prejudices on the part of employers or fellow workers who fear contracting infectious diseases.

But the Court stopped short of forcing an employer to employ someone who actually has a highly contagious disease. That is, only those individuals who are both handicapped and "otherwise qualified" for the position in question are eligible for relief under the Rehabilitation Act. Thus, the second prong of the analysis is whether or not an individual is "otherwise qualified." Here the Court recommended considering the level of contagiousness before determining that an individual is eligible for the Rehabilitation Act's protection. The Court was unable to rule on this issue in Arline because of the paucity of factual findings made by the trial court. The District Court made no finding as to the duration or severity of Arline's condition nor to the probability that she would transmit the disease.

The Supreme Court also did not determine whether Arline was contagious at the time she was discharged, or whether the School Board could have reasonably accommodated her.' Thus, the Court remanded the case so the lower court could make appropriate findings of fact. This inquiry is essential, the Court stated, if the Rehabilitation Act is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns as avoiding exposing others to significant health and safety risks. Clearly, this last concern -- avoiding health and safety risks -- evidences the Court's wish to protect the public from harmful infectious diseases, and the Court considers such an inquiry both legitimate and necessary under any analysis pursuant to the Rehabilitation Act.

Using the guidelines submitted by the American Medical Association, the Court outlined the appropriate inquiry to determine whether a person is "otherwise qualified" in the context of the employment of a person handicapped with a contagious disease:

> [Findings of] fact based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and

(d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[27]

The Court also noted that in making these findings, courts normally should defer to the reasonable medical judgments of public health officials.

The next step under the "otherwise qualified" inquiry is to determine whether a person who suffers from an infectious disease may be reasonably accommodated. The Court stated that a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be "otherwise qualified" for his or her job if reasonable accommodation will not eliminate that risk. Thus, the Court indicated that the Act would not require an employer to employ an employee with an active, contagious disease.[28]

2. The Dissent

Chief Justice Rehnquist and Justice Scalia would have reached a different result than the majority, using somewhat different reasoning. The dissenters focused on the contractual nature of Section 504 on the basis that Section 504 bars recipients of federal financial assistance from discriminating against handicapped people. The recipients of federal aid include federal contractors, many state, local and

federal agencies and almost all public schools. The cost to the grantee of receiving the money is to provide employment for the handicapped.

Having thus framed the issue as a contract question, the dissenters pointed out that where Congress intends to impose a condition on the grant of federal funds it must do so unambiguously, citing Pennhurst State School and Hospital v. Halderman.[29] Finding no basis in the Act, the regulations, or the Act's legislative history, indicating that individuals with contagious diseases were handicapped persons subject to federal protections, the dissenters stated that the recipients of federal aid were without a "knowing acceptance" that their receipt of federal funds would be conditioned on Rehabilitation Act regulation of public health issues. In other words, they felt it unfair to add this additional condition on receiving federal funds.

E. Discrimination Based on Fear of Contagion

In Arline, the Supreme Court expressly left open the question of whether a person who is simply a carrier of the disease, without having any physical impairment (or history of physical impairment), or without suffering any other symptoms associated with the disease, would also be considered a handicapped individual entitled to Section 504 protections.

Thus, the arguments of the U.S. Department of Justice in its Amicus brief and earlier Memorandum of Law [30] could yet be revived as to carriers of the AIDS virus who do not or have not suffered other symptoms of the disease. Essentially, the Department of Justice Memorandum had concluded that an individual's real or perceived ability to transmit disease to others (absent any other physical disability) is not a protected handicap within the meaning of Section 504. Thus, the Justice Department's conclusion was that if an employee suffers from the disabling effects of the disease, then that employee must be protected by the anti-discrimination provisions of Section 504. However, an employer would not be prohibited from discriminating against a person based upon the employer's fear of contagion whether or not the fear was justified.[31] The Justice Department's reasoning was as follows:

> The need for such an analysis is highlighted because the disabling effects of a contagious disease do not always go hand-in-hand with the ability to transmit the disease to others. Some individuals, while personally immune to the effects of the disease may nevertheless be carriers able to spread it. Other persons, while still suffering from the effects of a communicable disease, may no longer be able to transmit it to others. Finally, some individuals may well suffer from the effects of the disease and be able to transmit it.[32]

The impact of the Justice Department's Memorandum was to create great confusion as to how the federal civil rights investigators would proceed. And, the Justice Department's conclusions fly in the face of long-standing precedent that fear of contagion or fear of future injury is not a lawful basis for discrimination against employees who are otherwise qualified to perform the job duties.

Earlier cases under Title VII of the Civil Rights Act uniformly hold that the preference of customers or co-workers is not a lawful basis to reduce employment opportunities.[33] Neither has such discrimination been justified by the employer's argument that an employee should not be hired based upon the employee's future inability to perform the job because of anticipated excessive absenteeism.[34] Similarly, the employer's fear of increased medical costs have been held to be an invalid basis for rejecting otherwise qualified applicants.[35]

Finally, courts have not allowed employers to refuse to hire employees based upon fear of injury to such employees. In Hayes v. Schelby Memorial Hospital,[36] the court held that the employer had unlawfully discriminated against a pregnant radiation technologist in order to avoid harm to the fetus where the employer had failed to show scientific evidence of

substantial risk of harm to the fetus and failed to explore other temporary jobs. In E.E. Black v. Marshall,[37] the court held that a federal contractor may not refuse to hire a handicapped worker because of fear of injury to the worker unless it can show that such exclusion is required by business necessity in the safe performance of the job.

What was established in Arline is that a significant number of states have already adopted laws and regulations requiring students and staff to establish that they are free from communicable disease in order to attend or teach in the public schools.[38] If the District Court on remand overlooks the necessity for school boards to determine whether an employee with a communicable disease is "otherwise qualified" for the job, it will remove from the states the ability to regulate communicable disease.[39]

Since the analogy on communicability of AIDS is not complete, the application of the Arline decision may be of little benefit to school boards.[40] The issue of the bona fide occupational qualification will still exist. To that extent, the great weight of medical authority must guide the school boards in treating AIDS victims.

F. Handicap Protections of Students

The Arline decision may significantly affect the handicap protections of students. In that regard, a federal judge in California may have already initiated the process for that issue to be decided on behalf of students. In Thomas v. Atascadero Unified School District (C. Cal., 11/17/86), the District Court granted a Motion for Preliminary Injunction filed on behalf of Ryan Thomas, a child with AIDS, who was barred from kindergarten after he bit a classmate. In ordering that the school district readmit Ryan to class, the Judge stated that Ryan's condition amounted to a protected handicap under Section 504 of the Rehabilitation Act and that the school had not shown that he presented a risk of transmission of the virus by being in the classroom. As such, the burden of proof was transferred from the AIDS victim to the school board to demonstrate why the exclusion was necessary.

In an earlier unreported decision, the Queens County New York Superior Court ordered that AIDS victims be permitted to attend school upon the showing by the Defendants that the risk of transmission in the regular classroom would pose no significant public health risks.[41] In District 27 Community School Board v. the Board of Education of the City of New

York, the court declined to find that all AIDS children were required to be excluded from school as cases or carriers of communicable disease under the applicable health code. In upholding the children's right to attend public school, the court also held that:

> [A]bsent any rational basis for Petitioner's proposed exclusion of only known AIDS carriers of the virus, without imposing such exclusion in the case of ARC (AIDS related complex) patients or asymptomatic carriers who are likely to present a risk of contagion because they too are infected with HTLV-III/LAV, such a proposal must be deemed as a denial of equal protection.[42]

The analogy in the New York City case was made to the earlier case of New York State Association for Retarded Children v. Carey.[43] In Carey, the court held that the school officials violated Section 504 of the Rehabilitation Act by isolating retarded children who were carriers of the Hepatitis-B virus from the rest of the school community. The court based its decision in part on the school official's failure to demonstrate that the children carrying the Hepatitis-B virus posed a health hazard to others with whom they might come into contact. The court concluded that where only the mentally retarded carriers of the Hepatitis-B virus were isolated and other carriers of Hepatitis-B virus were not isolated, the isolation constituted a stigmatizing action

which irreparably disrupted the students' educational development.[44]

In one of the earliest and most emotional AIDS school cases, a 13-year old hemophiliac was barred from attending school for almost one full school year when it was revealed that he had acquired AIDS through blood transfusions. In Ryan White v. Western School Corp.,[45] the court determined (and the school district did not contest the finding) that the student was handicapped within the meaning of the Education of All Handicapped Children Act ("EAHA," P.L. 94-142) and was to be provided a multi-disciplinary staff conference to determine the best educational placement for him. Ultimately, and after protracted litigation, it was determined that the regular school placement was most appropriate for Ryan White. The question of whether an AIDS student is entitled to all of the protections of EAHA based solely on the AIDS condition, was not an issue specifically addressed by the White case. Such an issue will surely be presented before long.

III. PRIVACY RIGHTS OF AIDS VICTIMS VS. THE PUBLIC'S RIGHT TO KNOW

The need to preserve the confidentiality of students with AIDS remains paramount. If a parent voluntarily

discloses a student's medical condition, such record is entitled to all of the protections of the Family Educational Rights and Privacy Act (Buckley Amendment, 20 U.S.C. Sec. 1232g).[46] And yet school boards will be under increasing pressure by school staff to disclose the identity of such students as a "hazard in the workplace" within the meaning of the Occupational Safety and Health Act (29 U.S.C. Sec. 254).[47]

Of even greater concern to school boards as employers is the risk of a privacy right violation where the medical condition of an employee is revealed to a third party. In a California case which is viewed as the first test of California's law protecting the confidentiality of AIDS testing and test results, a Los Angeles school teacher filed a $5 million law suit against the University of South California Medical Center. In Rodway v. Los Angeles County and the USC Medical Center, Case No. 608, 627, Allan Rodway charged that a medical insurance form which identified him as having AIDS was negligently sent to his employer, the Los Angeles County Unified School District, causing him to temporarily lose his job as a part-time teacher. The complaint charged violation of the state's Confidentiality of Medical Information Act as well as statutes prohibiting negligent infliction of emotional stress and defamation of character.

Similarly, the requirement that an employee submit to an AIDS blood test could give rise to a claim of libel or slander where the employee at issue did not have AIDS. The April, 1986, Lambda Legal Defense and Educations' AIDS - Update, reported that Vernon Saxton a general manager in a restaurant was fired from his job after an anonymous letter was sent to the Fayette County, Ohio, Health Commissioner stating that Mr. Saxton had AIDS. The Health Commissioner then sent the letter to Mr. Saxton's employer. His employer read the letter at a general staff meeting. Mr. Saxton, who does not have AIDS, had been employed at the restaurant for 23 years. A suit had been filed on the basis of libel per se against Fayette County, the Commissioner of Health, the restaurant for $1.5 million.

The risk of libel and slander increases in a school setting where numerous people have access to the medical records of students and employees. In Illinois, for example, the Department of Public Health has required by regulation that all cases of AIDS be reported to the local health authority. Other states have undertaken similar reporting requirements. The attempt to have AIDS treated as a contagious disease within California was the subject of a proposition placed before the voters in 1986. The unsuccessful proposition sought to have AIDS treated as a contagious disease by the State's

Department of Public Health for purposes of imposing quarantine and barring persons infected with the AIDS virus from school systems and jobs in food handling and would also have required testing for exposure to the virus. Many other states have adopted or proposed AIDS reporting laws. It is unlikely that this trend will be reversed.

IV. LEGAL ISSUES REGARDING BLOOD SCREENING AND INSURANCE

Testing for AIDS antibodies has become a key focus in the area of AIDS prevention. Regulations under the Federal Rehabilitation Act do not prohibit per se preemployment blood testing for AIDS as long as such testing is part of preemployment physicals routinely given to all applicants after a conditional offer of employment has been made. However, if persons with positive AIDS antibody blood tests are deemed handicapped individuals, an employer cannot lawfully reject an applicant based on the blood test results. In addition, some state handicap regulations may prohibit preemployment testing, and most, if not all state statutes prohibit an employer from discriminating against an applicant with positive test results, if such persons are handicapped within the meaning of the applicable state statute.

Also, as noted below, some state statutes and local ordinances expressly regulate the use of AIDS antibody tests by employers. Where such tests would be used to determine an applicant's sexual preference, the discrimination would be prohibited in Wisconsin, District of Columbia, New York City, Boston, Philadelphia, Detroit, San Francisco, Los Angeles, and Austin, Texas, where discrimination on the basis of sexual preference if prohibited. In Wisconsin, Florida, and California, employers may not use the results of AIDS antibody blood tests as a basis of any employment decision.

Another aspect of employer's liability in the area of blood testing could be the employer's liability for failure to inform an employee being tested where positive test results are detected by the examination. An employer who undertakes to make a physical examination of his employee may be under a duty to inform the employee of any dangerous or potentially dangerous disease or condition disclosed by that examination. In Union Carbide and Carbon Corp. v. Stapleton,[48] the plaintiff charged his former employer with negligence in failing to inform him of a tubercular condition disclosed by x-rays taken in the employer's medical department. The court held that although the employer may be under no initial obligation to undertake the examination, when it does do so, the employee is entitled to rely on the expectation that he will be told of any dangerous conditions dis-

closed, and the employer may be liable for the negligent omission to advise him of such dangerous condition.

It is not clear whether it must be shown that an employer had actual or presumed knowledge of the results of a physical examination before the employer may be liable for the failure to inform the employee of a disease or physical condition discovered in that examination. In Lotspeich v. Chance Vought Air Craft,[49] the record showed that the employer did not have knowledge of its employee's tubercular condition. Even though the employer may have negligently failed to discover the employee's disease, the employer was not liable since it owed no legal duty to the employee to discover and disclose to her the fact that she had tuberculosis.

In some cases the failure of an employer to inform its employees of contagious disease disclosed in a physical examination of the employee has given rise to a cause of action by one who contracts the disease from the employee.[50] Thus, considering the potential for liability in the area of employment discrimination and the duty to inform the employee of a known medical condition, employers are best advised not to undertake blood testing of its employees unless the

positive result of such a blood screening test can be lawfully used in an employment decision.

The confidentiality issue in blood screening is one which the New York State Department of Health addressed in emergency rules establishing strict standards of procedures and confidentiality for laboratory and blood and tissue banks that do antibody testing. Under the new rule a request to clinical laboratories for each of these screenings must bear the signature of a referring physician certifying that the patient's blood is to be tested and that the patient received information about the limitations, risks involved during each of the tests, has signed a written and informed consent and will receive post-test counselling.[51]

At the same time insurers in Connecticut have been barred from asking applicants for health or life insurance coverage about any previous AIDS test they may have taken under an order issued by the State Insurance Commissioner. A similar prohibition was promulgated by insurance commissioners in Maine, New Jersey, California, Wisconsin, the District of Columbia and the state of Washington. However, the District of Columbia law has been challenged as unconstitutional by insurance companies in a complaint for a temporary restraining order and injunction filed in August, 1986.

The District of Columbia law bars insurers for five years from requiring testing to detect AIDS antibodies or to assess the status of an individual's immune system.[52] The plaintiffs alleged that the legislation is unconstitutional because it has no rational relationship to a legitimate government end. Further, plaintiffs alleged that the District of Columbia City Council misunderstood basic and accepted underwriting practices.[53]

However, with the staggering projections of the cost of treatment of the disease projected at $6 billion by 1991,[54] or over $100,000 for hospital expenses per person, insurers will continue to press for all relevant information about an applicant's current health status.[55] Thus, if AIDS testing is prohibited by both employers and insurers, the question of who will bear the cost of providing the expensive medical care needed for AIDS patients will again fall on employers, through increased premiums.

While the need for mandatory blood screening will normally not be justified in employment settings, there may be instances in which such screenings will be required. Most obvious would be of health care workers who are involved in the open wounds of others and second, in prostitution. There is also an apparent trend to requiring HIV antibodies screening prior to issuance of a marriage license similar to

the blood testing required for other sexually transmitted diseases. The benefits and disadvantages of mass screenings and other related issues are thoughtfully considered in recent articles co-authored by doctors and lawyers.[56] Similarly, issues of informed consent and patient confidentiality were considered in an article also authored by a doctor and a lawyer.[57]

V. CURRICULUM ISSUES

While most high schools have a traditional health education curriculum, it will be another balancing act for school boards to develop AIDS education materials acceptable to parents and explicit enough to reach sexually active teenagers, both gay and straight, who are most at risk of developing AIDS. In New York City, complaints from some school board members sent one of the most explicit AIDS videos "Sex, Drugs, and AIDS" back to its producers, ODN Productions, to include more emphasis on abstinence and to alter its treatment of homosexuality.[58] A recent Time magazine poll found that 95% of respondents agreed that children as young as 12 should be taught about the dangers of AIDS.[59] A similar Newsweek poll found that 70% believe that education in grade school is an important way to combat AIDS.[60] Thus, Surgeon General Everett Koop in his plea for education estimated that 12,000-14,000 people could be saved from death by AIDS by

1991 if people avoid sexual and drug related activities that transmit AIDS. Education is then our best cure.[61]

CONCLUSION

The legal maze revolving around employers' rights and handicap discrimination will continue. Yet the public at large will still look to the medical community to resolve the fears, tensions and conflicts which this epidemic has brought upon us. To that end we look to the developments in the medical community to hope that a cure or a treatment for AIDS will be found. Under that pressure, the officials from the public health services and the Burroughs Wellcome Company have recently announced that AZT, an AIDS drug tested in clinical trials, would be made available to additional AIDS patients outside of its clinical trials. While AZT is not a cure for AIDS, the study results hold great promise for prolonging the life of certain patients with AIDS.[62]

The full impact that the AIDS epidemic will have upon the public schools is only beginning to be comprehended.[63] It seems clear that for a variety of legal reasons children with AIDS will not be automatically excluded without a demonstration by the school board that the risk of transmission of AIDS by such children is an unreasonable or significant one.

School district leaders must take a leadership role in educating the public and its students with respect to the risk of AIDS transmission. Concurrently, the school boards must respect the privacy rights of infected individuals and adopt a policy which will treat all AIDS victims in a manner that accords them the maximum legal and medical protections required in each individual case.

FOOTNOTES

1/ "AIDS" is the acronym for Acquired Immune Deficiency Syndrome. It is also referred to by the virus which causes it, Human T-Lymphotropic Virus Type III (HTLV-III). In 1986, the term "HIV" for Human Immunodeficiency Virus was adopted to describe both the condition and the virus.

2/ On August 1, 1983, the General Counsel of the New York State Division of Human Rights issued an opinion declaring AIDS to be a handicap within the meaning of the New York Human Rights Law.

3/ Pub. Health Ser. Guidelines on AIDS in the Workplace, MMWR, 11/15/85; Pub. Health Ser. Guidelines on Education and Foster Care of Children Infected with HTLV-III/LAV, MMWR, 8/30/85.

4/ From the Surgeon General, JAMA, 11/28/86, Vol. 256, No. 20.

5/ Id. at pp. 2785-86.

6/ Id. at p. 2783.

7/ Id.

8/ Chicago Sun-Times, January 30, 1987.

9/ "The AIDS Epidemic: A Special Report," Newsweek, 11/24/86, pp. 30-31.

10/ Id. at p. 31.

11/ Id.

12/ "AIDS Cases Increasing Among Kids," Chicago Tribune, Feb. 2, 1987, pp. 1, 12.

13/ Id. at p. 12.

14/ Newsweek, 11/24/86 at p. 33.

15/ See, e.g., AIDS Policy and Law, Buraff Publications, 1/29/86, Vol. 1 No. 1, et seq. (hereinafter APL).

16/ "Georgia School Board Bans Students, Teachers With AIDS," APL Vol. 1, No. 16, 8/27/86.

17/ See, e.g. "AIDS Discrimination Issue Mushrooming," The Washington Post, 11/24/86, p. 1.

18/ 772 F.2d 759 (11th Cir. 1985), ___ U.S. ___, 107 S. Ct. 1123 (1987).

19/ APL, Vol. 1, No. 18, p. 5 (9/24/86).

20/ FCHR, No. 85-0624 (Fla. Comm. on Human Rights, 12/11/85); No. 85-6623CIV (S.D. Fla. 1986).

21/ DLR, No. 237, 12/10/86, p. A-8.

22/ Doe v. Charlotte Mem. Hospital, Case No. 4-84-3096; APL Vol. 1, No. 15 (8/13/85).

23/ 107 S. Ct. at 1126.

24/ 107 S. Ct. at 1127.

25/ 107 S. Ct. at 1128; fn. 7.

26/ 107 S. Ct. at 1129.

27/ 107 S. Ct. at 1131.

28/ Id.

29/ 451 U.S. 1; 101 S. Ct. 1531 (1981).

30/ Application of Section 504 to Person with AIDS, AIDS-Related Complex or Infection with the AIDS Virus, Memorandum for Ronald E. Roberts, General Counsel, Department of Health & Human Services (6/23/86).

31/ Id. at p. 23.

32/ Id.

33/ See, e.g., Sprogis v. United Airlines, 444 F.2d 1194, 1199 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1971).

34/ Chrysler Outboard Corp. v. DILHR, 14 Fair Emp. Prac. Cas. (BNA), 344, 345 (Wisc. Cir. Ct. 1976).

35/ McDermott v. Xerox, 491 N.Y.S.2d 106 (1985).

36/ 726 F.2d 1542 (11th Cir. 1984).

37/ 497 F. Supp. 1088 (D. Hawaii, 1980).

38/ Brief of Amicus Curiae NSBA, in Board of Education of Nassau County v. Arline, supra at fn. 18, p. 9.

39/ See Appendix in NSBA Amicus Brief in Arline, supra at fn. 18. "Statutory Requirements On School Health" and Table of Citations contained therein.

40/ In a medical footnote of some irony, the Centers for Disease Control reported in 1986 that the incidence of tuberculosis in the United States appeared to be increasing since 1981. The suspicion within the medical community was that the HTLV-III/LAV infection may be responsible for increased tuberculosis morbidity. The suspicion was supported by the increase in tuberculosis in those areas of the country where there was a high incident of AIDS patients also reported.

41/ District 27 Community School Board of Education v. City of New York, No. 14940/85, Feb. 11, 1986.

42/ Slip. Op. at 57.

43/ 466 F. Supp. 479 (E.D.N.Y. 1978); same case 466 F. Supp. 487 (E.D.N.Y. 1979).

44/ 466 F. Supp. at pp. 499-500.

45/ IP-85-1192C (S.D. Ind. Aug. 23, 1985).

46/ Mawdsley, Ralph, "Privacy Rights of AIDS Victims," 31 Ed. Law Rptr. 697 (1986).

47/ "OSHA Asked for Emergency AIDS Rule," APL, Vol. 1, No. 19, p. 4, 10/8/86.

48/ 237 F.2d 229 (6th Cir. 1956).

49/ 360 S.W.2d 705 (Tex. Civ. App. 1963).

50/ Wojcik v. Aluminum Company of America, 183 N.Y.S.2d 351 (1959).

51/ APL, Vol. 1, No. 20 (Oct. 20, 1986).

52/ APL, June 4, 1986, p. 2.

53/ American Council of Life Insurance and Health Insurance Association of America v. The District of Columbia, and Mayor Marion Barry, (D.D.C. 86-2131).

54/ "AIDS in Business: Problems of Costs and Compassion," Fortune, 9/15/86.

55/ The Actuarial Update, Vol. 15, No. 6, June, 1986.

56/ "HIV Antibodies Screening - An Ethical Framework for Evaluating Proposed Program," JAMA, Oct. 3, 1986, Vol. 256, No. 13.

57/ Illinois Bar Journal, p. 206, et seq., Dec. 1986.

58/ "AIDS Taking Its Place On School Curriculum," Chicago Tribune, February 2, 1987, pp. 1, 12.

59/ "AIDS: New Research, New Danger," Time Magazine, Nov. 3, 1986, p. 76.

60/ "The AIDS Epidemic," Newsweek, Nov. 24, 1986, p. 33.

61/ While the NSBA opposed the Surgeon General's recommendations regarding elementary school education of AIDS, the NSBA and the CDC have cooperatively developed guidelines for school boards on sex education. APL, Vol. 1, No. 24, 12/17/86, p. 3.

62/ "Promising Results Halt Trial of Anti-AIDS Drug," Science, Vol. 234, Oct. 3, 1986.

63/ "The Impact of AIDS Upon Public Schools: A Problem for Jurisprudence," 32 Ed. Law Rptr. 603, July 24, 1986.